

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

RACHELLE COMMODORE,	:	
Petitioner,	:	
	:	
v.	:	PRISONER
	:	Case No. 3:05CV841(CFD)
	:	
WARDEN W.S. WILLINGHAM,	:	
Respondent.	:	

**RULING ON PETITION FOR WRIT OF HABEAS CORPUS**

The petitioner, Rachele Commodore (“Commodore”), is currently confined at the Federal Correctional Institution in Danbury, Connecticut. She brings this action for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241. The court concludes that it lacks jurisdiction under § 2241 to entertain Commodore’s claims.

**Procedural Background**

Commodore was convicted in 2000 of bank robbery and related offenses in the United States District Court for the Southern District of New York and sentenced to a term of imprisonment of 121 months. She did not file a direct appeal of her conviction. However, her motion filed pursuant to 28 U.S.C. § 2255 was denied by an order dated September 19, 2002. See Pet’r’s Mem. Ex. F. Commodore did not appeal the denial of her § 2255 motion. See Pet. at ¶ 16(a)(7).

By petition certified as mailed on May 23, 2005, Commodore commenced this action pursuant to 28 U.S.C. § 2241. She challenges her conviction in light of the Supreme Court’s

decision in United States v. Booker, 543 U.S. \_\_\_, 125 S. Ct. 738 (2005). Specifically, she challenges the sentencing court’s findings concerning sentencing guideline calculations.

### Discussion

As an initial matter, the court must determine whether it has jurisdiction to entertain Commodore’s claim in a petition filed pursuant to 28 U.S.C. § 2241.

Since the enactment of the Judiciary Act of 1789, the federal court in the district in which a prisoner is incarcerated has been authorized to issue a writ of habeas corpus if the prisoner was in custody under the authority of the United States. See Triestman v. United States, 124 F.3d 361, 373 (2d Cir. 1997). Today, this authority is codified at 28 U.S.C. § 2241(c)(3). In 1948, however, Congress enacted 28 U.S.C. § 2255. This statute “channels collateral attacks by federal prisoners to the sentencing court (rather than to the court in the district of confinement) so that they can be addressed more efficiently.” Id.

Currently, “[a] motion pursuant to [section] 2241 generally challenges the *execution* of a federal prisoner’s sentence, including such matters as the administration of parole, computation of a prisoner’s sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions.” Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001) (citing Chambers v. United States, 106 F.3d 472, 474-75 (2d Cir. 1997) (describing situations where a federal prisoner would properly file a § 2241 petition)). A § 2255 motion, on the other hand, is considered “the proper vehicle for a federal prisoner’s challenge to [the imposition of] his conviction and sentence.” Id. at 146-47. Thus, as a general rule, federal prisoners challenging the imposition of their sentences must do so by a motion filed pursuant to § 2255 rather than a petition filed pursuant to § 2241. See Triestman, 124 F.3d at 373.

In her § 2241 petition, Commodore challenges her conviction and sentence, claims properly raised in a § 2255 motion, and, hence, with the sentencing court in the Southern District of New York. Section 2255 contains a “savings clause” which “permits the filing of a [section] 2241 petition when [section] 2255 provides *an inadequate or ineffective remedy* to test the legality of a federal prisoner’s detention.” Jiminian, 245 F.3d at 147 (emphasis added); see also, e.g., Tucker v. Nash, No. 00-CV- 6570(FB), 2001 WL 761198, at \*1 (E.D.N.Y. June 29, 2001) (referring this section as the “‘savings clause’ of § 2255”).

The exception permitting an inmate to file a § 2241 petition is not available, i.e., a motion pursuant to § 2255 is not “inadequate or ineffective”, simply because a prisoner is procedurally barred from filing a § 2255 motion. The failure to allow collateral review also must raise serious constitutional questions.

The Second Circuit has afforded relief under the exception when a § 2255 motion was not available and the petitioner was claiming “actual innocence” of the crime of which he was convicted. See Triestman, 124 F.3d at 380. Other circuits also have construed narrowly the applicability of the exception. The Fifth Circuit has held

that the savings clause of [section] 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner’s trial, appeal or first [section] 2255 motion.

Reyes-Requena v. United States, 243 F.3d 893, 904 (5<sup>th</sup> Cir. 2001). See also Charles v. Chandler, 180 F.3d 753, 756 (6<sup>th</sup> Cir. 1999) (“[section] 2255 remedy is not considered inadequate or ineffective simply because [section] 2255 relief has already been denied . . . or because the

petitioner is procedurally barred from pursuing relief under [section] 2255 . . .”) (citations omitted); Wofford v. Scott, 177 F.3d 1236, 1245 (11<sup>th</sup> Cir. 1999) (agreeing with other courts that section 2241 cannot be used “to free a prisoner of the effects of his failure to raise an available claim earlier”) (citations omitted); In re Vial, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997) (“the remedy afforded by [section] 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision or because an individual is procedurally barred from filing a [section] 2255 motion”).

Against this backdrop, the court now considers Commodore’s grounds for relief to determine whether § 2255 is “inadequate or ineffective” to address her claims, and hence, whether the District of Connecticut has jurisdiction to entertain her § 2241 petition. Commodore argues that she cannot seek relief pursuant to § 2255 because she already has filed a § 2255 motion. In addition, she states that her petition is based on the recent Supreme Court decision, United States v. Booker.

As mentioned, the fact that § 2255 relief previously was denied does not render relief pursuant to § 2255 inadequate or ineffective by itself. Section 2255 also provides that a second or successive motion may be filed only under certain narrow circumstances, when permitted by the Court of Appeals. Commodore does not indicate that she has sought certification from the Court of Appeals to file a second motion. Further, even if the court were to find that § 2255 relief was “unavailable,” Commodore’s inability to raise this claim would not warrant application of the savings clause. The Second Circuit has indicated that the § 2255 exception will apply in “relatively few” cases “in those extraordinary instances where justice demands it.” Triestman, 124 F.3d at 378. In Triestman, the Second Circuit determined § 2241 relief was available

because Triestman was claiming actual innocence. The Eleventh Circuit also requires a claim of actual innocence to invoke the exception clause. See Wofford, 177 F.3d at 1244 (11<sup>th</sup> Cir. 1999) (“The savings clause of § 2255 applies to a claim when: 1) that claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner’s trial, appeal, or first § 2255 motion.”).

In her petition, Commodore does not deny committing the crime of which she was convicted. Rather she challenges the enhancement of her sentence under the Sentencing Guidelines. Thus, even if the court were to determine that § 2255 was “unavailable,” Commodore would not satisfy the Triestman standard. Thus, Commodore’s claim does not involve “constitutional errors” that must be heard under § 2241. The court therefore concludes that Commodore has not met the requirements which would permit her to invoke this court’s jurisdiction to hear her claims pursuant to 28 U.S.C. § 2241 and the District of Connecticut lacks jurisdiction to entertain Commodore’s § 2241 petition.

The Second Circuit has held that, where a petitioner already has filed a § 2255 motion, the district court may construe a petition filed pursuant to § 2241 as a second § 2255 motion and transfer the motion to the Court of Appeals to enable that court to determine whether certification to file a second petition should be granted. See Jiminian, 245 F.3d at 148-49.

#### Conclusion

The court concludes that it lacks jurisdiction to consider this petition pursuant to 28 U.S.C. § 2241. Accordingly, the court recharacterizes the petition as filed pursuant to 28 U.S.C.

§ 2255 and transfers the petition to the Court of Appeals for the Second Circuit to enable that court to determine whether a second § 2255 motion should be certified.

**SO ORDERED** this 8<sup>th</sup> day of December, 2005, at Hartford, Connecticut.

/s/ CFD  
CHRISTOPHER F. DRONEY  
UNITED STATES DISTRICT JUDGE